been found in which the question was expressly argued, the result reached in two cases not cited tend, on the facts as found in them, to support the view in the principal case.[11]

RECENT CASES.

BAIL — LIABILITY TO ANSWER CHARGES NOT NAMED IN BOND. — The defendant was surety on a bail bond reciting a charge of homicide and conditioned that the prisoner "appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court." The grand jury dismissed the charge of homicide, but found an indictment for perjury. Upon the prisoner's failure to appear and plead to the indictment for the latter offense, the recognizance was forfeited. *Held*, that the defendant's motion to set aside the judgment of forfeiture should be denied, since, under the bond, the prisoner is bound to answer all charges whether for the same or different crimes. Two justices dissented. *Pernetti* v. *People*, 91 N. Y. Supp. 210.

This decision overrules an expression of the court upon a former appeal of the case, but conforms to strong *dicta* announced in former New York opinions. *Cf. People* v. *Pernetti*, 95 N. Y. App. Div. 510; *People* v. *Gillman*, 125 N. Y. 372. Upon the theory that bail is imprisonment in the custody of the sureties instead of in that of the jailer, and reference to the criminal charge, merely description of its occasion, there seems no escape from the court's conclusion. Since the precise nature of the crime may not be known upon arrest, it is most desirable to hold the prisoner for any indictments based on the criminal act charged, but, in spite of sweeping language, it is believed the decisions rarely go farther. *Cf. State* v. *Ridding*, 8 La. An. 79; *Gresham* v. *State*, 48 Ala. 625. The prevailing tendency is to construe the language of recognizances as applying strictly to appearance for the criminal act charged, or a crime growing therefrom. *State* v. *Brown*, 16 Ia. 314. The greater difficulty in obtaining sureties to be responsible for all charges, whether arising from the prisoner's prior or subsequent conduct, would seem to make this view more nearly in harmony with the humane object of bail.

BAILMENTS — GRATUITOUS BAILMENTS — NATURE AND EXTENT OF LIABILITY OF GRATUITOUS BAILEE. — The defendants gratuitously undertook to pass certain goods of the plaintiffs through the customs. Owing to the defendants' delay, the goods were not entered until after an anticipated change in the tariff rates, whereby the plaintiffs were obliged to pay a heavy duty, for which they now seek reimbursement. *Held*, that the defendants are not liable. *Commonwealth, etc., Co.* v. *Weber, etc., Co.*, 91 L. T. R. 813 (Eng. P. C.).

For a discussion of the principles involved, see 17 HARV. L. REV. 126.

BILLS AND NOTES — DOCTRINE OF PRICE *v.* NEAL — RECOVERY BY DRAWEE PAYING A FORGED DRAFT. — The plaintiff agreed to accept W.'s drafts for the price of cattle, if bills of sale signed by the vendor of the cattle should appear on the backs of the drafts. W. drew several drafts on the plaintiff, payable to a cattle dealer, wrote bills of sale on the backs, forged the cattle dealer's name, as vendor to the bills of sale, and as indorser to the drafts, and finally discounted these drafts at a bank which had no notice of any irregularity. The bank obtained acceptance and payment from the plaintiff. *Held*, that the money so paid may be recovered. *Lafayette & Bro.* v. *Merchants' Bank of Fort Smith*, 84 S. W. Rep. 700 (Ark.).

For a discussion of the principles involved, see 4 HARV. L. REV. 297.

BURDEN OF PROOF — QUANTUM OF PROOF IN CIVIL ACTIONS BASED ON A CRIME. — In a civil action for a felonious assault the defendant requested a ruling to the effect that the plaintiff must prove his case beyond a reasonable doubt. *Held*, that the request is properly denied. *Kurz* v. *Doerr*, 180 N. Y. 88.

This affirms the decision in the Appellate Division, commented upon in 17 HARV. L. REV. 198.

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[11] The Milligan, 12 Fed. Rep. 338; The Pegasus, 19 Fed. Rep. 46. See also conflicting *dicta* in The Daylesford, 30 Fed. Rep. 633; The Richmond, 63 Fed. Rep. 1020.

CARRIERS — DUTY TO ACCEPT AND CARRY PASSENGERS — BLINDNESS AS GROUND FOR REJECTION. — The defendant's agent in accordance with the rules of the company refused to sell a railroad ticket to the plaintiff on the ground that he was blind and unaccompanied by an attendant. *Held*, that the defendant is not liable in the absence of proof that its agent knew, or had reasonable grounds to believe, that the plaintiff, though blind, was qualified to travel alone. *Illinois Central R. Co.* v. *Smith*, 37 So. Rep. 643 (Miss.).

The *prima facie* duty of a carrier to accept all persons who present themselves for transportation must necessarily be subject to certain limitations made for the protection of the company. In view of the rule that a passenger who is affected with a disability of which the carrier knows, or has reason to know, is entitled to greater care and attention than an ordinary passenger, it seems but fair that the company should have the right of refusing to assume this added responsibility by requiring such persons to be accompanied by attendants. *Cf. Croom* v. *Chicago, etc., Ry. Co.*, 52 Minn. 296; *Columbus, etc., Ry. Co.* v. *Powell*, 40 Ind. 37. The cases which hold that a railroad may refuse to carry drunken and insane persons rest partly upon this principle of fairness to the company, as well as upon the policy of protecting passengers from annoyance and danger. *Cf. Pittsburgh, etc., Ry. Co.* v. *Vandyne*, 57 Ind. 576; *Meyer* v. *St. Louis, etc., Ry. Co*, 54 Fed. Rep. 116. Blindness alone would appear sufficient cause for rejection, unless the company's agent has reason to believe that the person is able to take care of himself. *Cf. Zachery* v. *Mobile and Ohio R. R. Co.*, 75 Miss. 746.

CONSTITUTIONAL LAW — SEPARATION OF POWERS AND DUE PROCESS OF LAW — IMPOSITION OF PENALTY BY ASSESSOR. — An Illinois statute required riparian landowners to remove all obstructions to the flow of water, and provided that the tax assessor should note any failure to do so, whereupon a drainage tax of ten dollars should be levied against each forty-acre tract as a penalty, to be collected like other taxes. The Illinois constitution provided that no person in one of the three departments of government should exercise any power properly belonging to another department, and declared that no person should be deprived of his property without due process of law. *Held*, that the statute is unconstitutional. *Cleveland, etc., R. Co.* v. *People*, 72 N. E. Rep. 725 (Ill.).

The primary object of taxation is raising revenue, while the present statute was meant rather to keep the streams clear by punishing failure to remove obstructions. The imposition of punishment, however, is for the judicial department, and tax assessors are not, properly speaking, judicial officers. *Cf. State* v. *Thorne*, 112 Wis. 81. The present case therefore seems sound: the constitution is not to be defeated by calling a penalty a tax. Attempts to do so are rare; but where a statute imposed a tax of ten thousand dollars on any lottery operating without permission, the court expressed the opinion that it was not really a tax and therefore was unconstitutional. *State* v. *Allen*, 2 McCord (S. C.) 55. The imposition by assessors of penalties for default in making return of taxable property or in paying taxes seems also logically a judicial function, but is upheld "on the ground of state necessity and immemorial usage." *Ex parte Lynch*, 16 S. C. 32; and see *Doll* v. *Evans*, 11 Am. Law Reg. (N. S.) 315. Due process of law was also wanting in the principal case, as the assessor's decision, though given without a hearing, was final. *Monticello Distilling Co.* v. *Baltimore*, 90 Md. 416.

CONTRIBUTORY NEGLIGENCE — THE LAST CHANCE DOCTRINE IN ADMIRALTY. — *Semble*, that, in determining questions of contributory negligence, the rule of the last clear chance is not law in admiralty. *The Steam Dredge No. 1*, 134 Fed. Rep. 161 (C. C. A., First Circ.). See NOTES, p. 537.

CORPORATIONS — DIRECTORS — DUTY TO ACT IN A BODY. — The New Jersey Corporation Act of 1898 permits incorporators to insert in the certificate of incorporation any provision creating or defining the powers of the corporation not inconsistent with the Act. The directors of the defendant company, authorized by the certificate of incorporation to act individually, purchased stock in that manner of the plaintiff. The latter sought to enforce the sale against the corporation. *Held*, that the plaintiff cannot recover, as directors must act as a unit to bind the corporation. *Audenried* v. *East Coast Milling Co.*, 59 Atl. Rep. 577 (N. J. Ch.).

The common law rule in regard to directors is that they can act only in a body, and any proceedings taken by them individually are of no effect on the corporation, even although a majority assent. *First National Bank* v. *Drake*, 35 Kan. 564. There seems to have been an opinion, more or less widespread, that the Act of 1898 abrogated this rule and allowed incorporators to authorize directors to act individually. This case, however, correctly decides that the general phraseology of the Act cannot be construed to permit such a departure from common-law principles, but must be interpreted

in accordance with them. To work so important a change, some specific enactment would be necessary.

CORPORATIONS — POWER OF CORPORATION TO PURCHASE ITS OWN SHARES.— *Held*, that a solvent corporation may purchase its own shares. *Burnes* v. *Burnes*, 132 Fed. Rep. 485 (Circ. Ct., W. D. Mo.).

Held, That a corporation may not purchase its shares if the effect would be to render the corporation insolvent. *In re S. P. Smith Lumber Co.*, 132 Fed. Rep. 618 (Dist. Ct., N. D. Tex.). See NOTES, p. 531.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — RIGHT OF PREËMPTION AT PAR. — The majority stockholders of a corporation in good faith voted to double the capital stock, and sell the shares to a stranger for four times their par value. *Held*, that a dissenting stockholder has no right to purchase at par a portion of such new stock, proportionate to his share of the original stock. *Stokes* v. *Continental Trust Co.*, 91 N. Y. Supp. 239.

Contrary to the present case, stockholders have almost everywhere been given the right of preëmption at par of a part of the increase of stock, proportionate to their original shares. *Cunningham's Appeal*, 108 Pa. St. 546. But this rule is not applied to stock issued in payment for property, nor to old stock, bought in by the corporation, and reissued. *Meredith* v. *New Jersey, etc., Co.*, 55 N. J. Eq. 211; *State* v. *Smith*, 48 Vt. 266. It is professedly allowed, to preserve each stockholder's influence in the corporation; but where a definite amount of new capital must be realized, this is accomplished equally well by allowing him the right to purchase only at the market value, since a smaller issue of stock would then be necessary. And the general rule practically compels corporations which wish to increase their stock, but have nearly reached their legal limit, to declare a dividend of the difference between the market value of the new stock and par; for those stockholders unable to subscribe can sell their right. See *Jones* v. *Concord, etc., R. R.*, 67 N. H. 234. This would tend to prevent corporations from increasing their stock and developing their resources. In Indiana the rule has been changed by statute. See *Ohio, etc., Co.* v. *Nunnemacher*, 15 Ind. 294.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — VESTING OF RIGHTS IN TRUSTEES. — A majority of the stock in a New Jersey corporation was transferred to an English corporation for voting purposes. *Semble*, that a voting trust is contrary to public policy and void. *Warren* v. *Pim*, 59 Atl. Rep. 773 (N. J., Ct. App.).

A reorganization committee, vested with title to stock under a trust agreement, was given power to make a final interpretation thereof, and to supply all defects and omissions. *Held*, that the committee cannot be made the final judge of its construction. *Industrial & General Trust* v. *Tod*, 180 N. Y. 215. See NOTES, p. 533.

CRIMINAL LAW — DEFENSES — JUSTIFICATION UNDER PRIOR DECISION OF COURT. — To an indictment of a tenant under a statute for removing crops without coming to an agreement with the landlord, the Supreme Court of the state held it a good defense that the balance of account was in favor of the tenant. For removal of crops under similar circumstances after this decision another defendant was convicted. *Held*, that the previous decision is incorrect, but that this defendant may have a new trial on the basis of that decision. *State* v. *Bell*, 49 S. E. Rep. 163 (N. C.).

A decision overruling former decisions does not change the law but gives revised evidence of what the law has always been. *Falconer* v. *Simmons*, 51 W. Va. 172. Consequently its application to transactions after the former decisions is not objectionable strictly as *ex post facto* nor as a law impairing contract obligations. *Central Land Co.* v. *Laidley*, 159 U. S. 103. But as it is practically open to the same objections, courts will not, in interpreting statutes, apply the new ruling to the prejudice of contract or property rights apparently acquired under the old. *Farrior* v. *New England, etc., Co.*, 88 Ala. 275. This is not extended to decisions under the common law. See *Ray* v. *Western, etc., Gas Co.*, 138 Pa. St. 576, 591. In criminal law reliance on former decisions should, as in the principal case, be a justification, not under mistake of law, but under the spirit in which *ex post facto* laws are prohibited — that acts which the court gave reason to suppose innocent should not be punished by a law which from a business point of view did not then exist. But obviously this policy does not apply to crimes involving moral turpitude. The only case found in point so decided. *Lanier* v. *State*, 57 Miss. 102.

DIVORCE — ALIMONY — PAYMENT AFTER DEATH OF HUSBAND. — The plaintiff was granted a divorce from her husband with alimony during her life, secured by a mortgage executed by her husband and the defendant. The plaintiff sued to recover

alimony accruing since her husband's death. *Held*, that the plaintiff may recover, since the obligation to pay alimony is a charge on the security although the personal obligation does not survive. *Wilson* v. *Hinman*, 99 N. Y. App. Div. 41.

Alimony at common law becomes payable only during the joint lives of the parties, and cannot be granted to continue after the death of the husband. *Maxwell* v. *Sawyer*, 90 Wis. 352. By statute, however, a court may be empowered to grant it for the life of the wife, continuing as a binding obligation against the husband's estate, if she survive him. *Stratton* v. *Stratton*, 77 Me. 373. The intermediate view adopted by the New York court, that alimony survives only where security is required and then only as a charge on the security, seems erroneous; if the personal obligation is gone, the mortgage is discharged also. *Cf. Williams* v. *Thurlow*, 31 Me. 392. Further, the earlier decision relied on in the principal case held unqualifiedly that a court may grant alimony payable after the husband's death, laying no stress on the giving of security. *Burr* v. *Burr*, 10 Paige (N. Y.) 20, 37. A later New York case reached just the contrary decision, holding that alimony could not be so granted. *Field* v. *Field*, 15 Abb. New Cas. 434. On principle, the obligation to pay alimony either ceases on the death of the husband, being purely personal, or survives against his estate whether security be given or not.

EJECTMENT — INTERFERENCE WITH EASEMENT — RAILROAD RIGHT OF WAY. — The plaintiff, a railroad company, acquired lots for railway purposes under condemnation proceedings, and the defendant, not claiming under the original owner, built thereon. *Held*, that the plaintiff has an action of ejectment, although it enjoyed only an easement. *Kansas, etc., Ry. Co.* v. *Burns*, 79 Pac. Rep. 238 (Kan.).

Unless railways are given a fee by statute or charter in lands acquired under eminent domain, they are commonly held to take only an easement. *Blake* v. *Rich*, 34 N. H. 282. Ejectment, being a possessory action, does not properly lie for an incorporeal right such as an easement. *Northern Turnpike Road Co.* v. *Smith*, 15 Barb. (N. Y.) 355. But the action has sometimes been allowed for such easements as city streets and parks, which involve exclusive control of a portion of the servient tenement. *San Francisco* v. *Grote*, 120 Cal. 59. Similarly, a railway company has been said to have a right to an actual possession of the surface, sufficient to support ejectment. *Tennessee, etc., R. R. Co.* v. *East Alabama Ry. Co.*, 75 Ala. 516. Granting that the railway's title to the soil is no more than an easement, it would follow logically that ejectment should have been denied and the plaintiff remitted to the ordinary remedies for obstruction of easements. The anomalous doctrine of the case must then be justified by the necessity which requires a summary remedy, and explained by the tendency to break down the rigid bounds which characterized forms of action under the common law. It seems, however, that such an extension would be better accomplished by legislation.

EMINENT DOMAIN — WHAT PROPERTY MAY BE TAKEN — SITE FOR STEAM POWER-HOUSE FOR ELECTRIC POWER COMPANY. — A company formed to manufacture, transmit, and sell electricity brought an action to condemn land for the use of its wires. *Semble*, that it might condemn land for a steam power-house. *Rockingham, etc., Co.* v. *Hobbs*, 72 N. H. 531. See NOTES, p. 528.

EXECUTORS AND ADMINISTRATORS — PROCEEDINGS BY — RIGHT LOST BY LACHES. — The plaintiff as administrator sought an order to sell certain real estate of the deceased, incumbered by dower, for the payment of debts. At the time of the death of the intestate the property was practically worthless, but after nineteen years had recently become valuable. *Held*, that the plaintiff is barred by laches. *Graham* v. *Brock*, 72 N. E. Rep. 825 (Ill.).

The question of laches is one of negligence. It does not depend, as does the running of a statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but upon the fact that, under all the circumstances of the particular case, the plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did. *Townsend* v. *Vanderwerker*, 160 U. S. 171. In this case the plaintiff refrained from petitioning for the sale of the land so long only as it was worthless. This would appear to be a sufficient explanation of his previous delay in bringing suit. On principle and on authority the decision seems erroneous, and is apparently irreconcilable with an earlier case in the same State. *Cf. Judd* v. *Ross*, 146 Ill. 40; *Conger* v. *Cook*, 56 Ia. 117.

EXTRADITION — INTERNATIONAL EXTRADITION — APPLICATION OF GAYNOR AND GREENE FOR HABEAS CORPUS. — The defendants, charged with the commission of theft in the United States, had taken up their residence at Quebec. In accordance

with the extradition arrangements between the United States and Canada, an application for their arrest upon an information charging theft was made to an extradition commissioner and a warrant was duly issued. Upon arrest they obtained a writ of *habeas corpus;* but on the hearing they were remanded into custody. Upon a writ of *habeas corpus* issued by another judge, however, they were discharged. *Held*, that the latter judgment must be reversed. *United States* v. *Gaynor*, 21 T. L. R. 254 (Eng., P. C.).

The division of the province into separate judicial districts makes it doubtful whether or not the first judge had jurisdiction. If he did, his decision was, under a Canadian statute, a bar to the issue of the second writ, as *res judicata*. But without considering whether the second judge was warranted in assuming jurisdiction, it seems clear that his discharge of the prisoners was erroneous. The only question before him was the lawfulness of the confinement. That it was lawful would seem to admit of no doubt. *Cf. Ex parte Gillespie*, 7 Quebec Q. B. 422. The commissioner was an official authorized by statute to order an arrest anywhere within the province upon a complaint alleging an offense named in the extradition treaty, and either at once or on remand to investigate the case. *Cf.* Extradition Act (Rev. St. Can., c. 142); see *Ex parte Seitz*, 8 Quebec Q. B. 345, 351, 352. In pursuance of his duty, he had ordered the defendants into custody to await a hearing, which would take place before him in due course. As theft was an offense within the treaty, it follows that the commitment was lawful.

GARNISHMENT — EXEMPTION OF WAGES — ESTOPPEL TO CLAIM STATUTORY EXEMPTION. — The plaintiff, at the request of the defendant, his debtor, garnisheed the defendant's employer. The defendant then moved for a release of the money attached, on the ground that it was exempt by statute as the earnings of the head of a family. *Held*, that the defendant is estopped to claim the exemption. *Dowling & Allgood* v. *Wood*, 101 N. W. Rep. 113 (Ia.).

A contract to waive exemption as against a particular debt if made when that debt is incurred is invalid, since to permit such contracts would defeat the operation of the exemption laws. *Kneetle* v. *Newcomb*, 22 N. Y. 249. Some courts, going further, have held that since the exemption was intended to benefit the debtor's family as well as himself, a waiver by him alone should not be recognized, for such recognition would defeat one purpose of the exemption laws. *Denny* v. *White*, 2 Cold. (Tenn.) 283. But by the weight of authority, while the principle first stated is admitted, the right of exemption is regarded as personal to the debtor, and as such, irrespective of the purpose with which it was given, is considered dependent for its exercise upon his will. *Charpentier* v. *Bresnaham*, 62 Mich. 360. If waiver is allowed, estoppel must be permitted, for acts falling short of estoppel may yet be a waiver. *Bramble* v. *State*, 41 Md. 435. It is somewhat difficult, on the meager facts reported, to find in the present decision all the elements of estoppel; but the result seems sound, since there was apparently at least a waiver of the exemption by the defendant.

IMPROVEMENTS — COMPENSATION — COLOR OF TITLE. — In an action to recover land, the defendant, who was in possession under a bond for title from a third person, claimed a judgment for the value of the improvements made by him upon the land, under a statute permitting recovery for such improvements where made by one believing himself to be the owner either in law or equity, under color of title. *Held*, that there is not sufficient color of title to satisfy the requirements of the statute. *Beasley* v. *Equitable Securities Co.*, 84 S. W. Rep. 224 (Ark.). See NOTES, p. 534.

INSURANCE — CONSTRUCTION OF PARTICULAR PHRASES — CHANGE IN "INTEREST, TITLE, OR POSSESSION." — A policy of fire-insurance provided that it should be void if any change should take place, by legal process or otherwise, in "interest, title or possession," excepting change of occupants without increase of hazard. Subsequently the insured was adjudged bankrupt and the appointment of a receiver over his property was entered in the referee's record. A fire destroyed the premises, following which the receiver was formally appointed and later made assignee in bankruptcy. *Held*, that the policy was not void at the time of the loss. *Fuller* v. *Jameson*, 98 N. Y. App. Div. 53.

After adjudication the bankrupt seems to hold his property under some undefined fiduciary relation, sometimes described as a trust. *Rand* v. *Iowa Central Ry. Co.*, 96 N. Y. App. Div. 413; *cf.* 18 HARV. L. REV. 63. Interest, as referred to in the policy, has been construed to include equitable interest. *Skinner, etc., Co.* v. *Houghton*, 92 Md. 68. Perhaps the change of interest was here immaterial, if, as the court says, the bankrupt's right to deal with his property was merely suspended and he still retained the interest desired as an incentive to vigilance and care. Had the receiver been formally

appointed before the fire, it may be that his possession, unless it came within the exception stated, would have avoided the policy. But see *Keeney* v. *Home Insurance Co.*, 71 N. Y. 396. That, under the Bankruptcy Act, title vests in the assignee upon formal appointment, as of the day of adjudication, is not conclusive against the decision. Such a fiction should not operate to the injury of third persons, as regards property not existing when the assignee qualifies. *Small* v. *Westchester, etc., Co.*, 51 Fed. Rep. 789, 795; *Fuller* v. *New York, etc., Co.*, 184 Mass. 12. The court, however, to avoid forfeiture and to protect creditors during the interim, has construed the policy very strongly against the company.

INTERSTATE COMMERCE — CONTROL BY STATES — ORIGINAL PACKAGES. — A state statute imposed a tax of three hundred dollars per annum on persons selling cigarettes. *Held*, that when pasteboard boxes, each containing ten cigarettes, and bearing a revenue stamp, are imported loose, the original package rule does not exempt the seller of such a package from taxation. *Cook* v. *County of Marshall*, 25 Sup. Ct. Rep. 233. See NOTES, p. 530.

JUDGMENTS — FOREIGN JUDGMENTS — FULL FAITH AND CREDIT UNDER THE FEDERAL CONSTITUTION. — The plaintiff sued his debtor in a Missouri court and garnisheed the defendant. Pending this proceeding, the defendant secured a decree in Missouri setting aside the contract between him and the plaintiff's debtor, and declaring that nothing was due the debtor. The latter then sued the defendant in New Jersey on two counts, — on the express contract, and for work and labor. The defendant pleaded the Missouri judgment to the first count and a general denial to the second. Judgment on the latter was given for the debtor and was paid. The plaintiff in the original proceeding then sought to secure judgment against the defendant on the basis of this New Jersey judgment, and the latter neglected to plead payment. *Held*, that since the judgment of the New Jersey court did not give full faith and credit to the Missouri judgment, the Missouri court need not give credit to that New Jersey judgment, and the plaintiff cannot recover. *Grimm* v. *Barrington*, 84 S. W. Rep. 357 (Mo., St. Louis Ct. App.).

This case seems questionable. The Missouri judgment was an affirmative defense similar to *res adjudicata*, and therefore, not having been pleaded to the second count in the New Jersey suit, the judgment on that count was correct. And no defense which with diligence might have been made in the suit can be an answer to an action elsewhere on the judgment. *Snow* v. *Mitchell*, 37 Kan. 636. But granting that the New Jersey court erred, by the general rule full credit must be given the judgment of a sister state, except when rendered by a court without jurisdiction, or when a collateral attack would be valid in that state. See *Barras* v. *Bidwell*, 3 Woods (U. S.) 5. Mere irregularity such as affords ground for direct appeal is no defense. *Milne* v. *Van Buskirk*, 9 Ia. 558. By the better view the error here, if any, would appear to have been ground rather for appeal than for collateral attack, and no appeal having been taken, Missouri was bound to give credit to the judgment. *Ex parte Boenninghausen*, 91 Mo. 301; *Buckmaster* v. *Carlin*, 4 Ill. 104.

LIMITATION OF ACTIONS — ACCRUAL OF ACTION — DISTRICT WARRANTS. —The plaintiff held warrants of a reclamation district drawn upon the county treasurer but not paid for want of funds, which it was within the power of the trustees of the district to provide by levying an assessment. After the lapse of more than the statutory period from the date of approval of the warrants, the plaintiff sued. *Held*, that as the plaintiff might have brought *mandamus* at any time to compel the raising of funds, he is barred. *San Francisco Savings Union* v. *Reclamation District*, 79 Pac. Rep. 374 (Cal.).

In assigning this ground for its decision the court takes a position opposed to that adopted in the case of *Barnes* v. *Turner*, 78 Pac. Rep. 108 (Okla.), which was adversely criticised in 18 HARV. L. REV. 230.

MALICIOUS PROSECUTION — PRELIMINARY INJUNCTION AS EVIDENCE OF PROBABLE CAUSE. — *Held*, that an injunction *pendente lite*, granted upon affidavits, is *prima facie* evidence of probable cause, so that, if in a suit for malicious prosecution it is not overcome by other evidence, a nonsuit is proper. *Burt* v. *Smith*, 181 N. Y. 1.

For a discussion of the holding in the lower court which is here reversed, see 17 HARV. L. REV. 61.

MORTGAGES — EQUITABLE MORTGAGES — RIGHT TO RENTS AND PROFITS. — *Held*, that an equitable mortgagee who has received rents from a tenant of the equitable mortgagor, cannot be compelled to refund them at the suit of the tenant. *Finck* v. *Tranter*, [1905] 1 K. B. 427.

In jurisdictions where a mortgagee holds legal title, the estate of the mortgagor is peculiar. He is not a tenant at will, for he is not entitled to emblements. See *Moss* v. *Gallimore*, 1 Doug. 279, 283. Nor is he like a receiver, for he need not pay rent, nor account to the mortgagee for rent received. *Ex parte Wilson*, 2 Ves. & B. 252. But the mortgagee may, by ejectment, obtain possession of the land, or require a tenant to pay him the rents. In dealing with the equitable mortgagee, equity follows the law. Accordingly, until he gets possession, the equitable mortgagee has no right to the rents. *Ex parte Bignold*, 4 Deac. & Ch. 259. He would, however, be entitled to rents and profits flowing from his own lawful possession. *Re Gordon*, 61 L. T. R. N. S. 299. And if he has received the rents, the mortgagor or his assignee in bankruptcy cannot take them from him. *Sumpter* v. *Cooper*, 2 B. & Ad. 223. Nor should the tenant in the principal case get any relief, for he has a good equitable defense to an action by the lessor, and paid with knowledge of all the facts, being mistaken only as to the law. See *Higgs* v. *Scott*, 7 C. B. 63.

MORTGAGES — TRANSFER OF RIGHTS AND PROPERTY — THE LAND AS DEBTOR AND THE MORTGAGOR AS SURETY. — A father made a deed of land covered by a mortgage as a gift to his daughter, and covenanted in the deed to pay the mortgage debt. After the father's death, the mortgage was foreclosed, and the daughter sought to recover from her father's estate the amount which her land was taken to pay. By statute, a deed did not require a seal. *Held*, that the plaintiff cannot recover. *Fischer* v. *Union Trust Co.*, 20 Detroit Leg. N., No. 132, p. 2 (Mich., Sup. Ct., Dec. 30, 1904).

Since the covenant to pay the mortgage, being gratuitous, was unenforceable, the plaintiff stood no better than a grantee subject to a mortgage. *Conrad* v. *Manning's Estate*, 125 Mich. 77. On foreclosure such a grantee is remediless. Notwithstanding this, the plaintiff contended for a right of subrogation, on the ground that her land was surety for the debt. There are strong *dicta* that on a grant of land subject to a mortgage, the land does not become the principal debtor, and the mortgagor the surety, at least, so that giving time against foreclosure will discharge the mortgagor from liability. See *Shepherd* v. *May*, 115 U. S. 505; *Chilton* v. *Brooks*, 72 Md. 554. But since the grant was subject to the mortgage, the land should bear the debt; and if the mortgagor pays, he should have subrogation against the land. If the creditor by giving time defeats this present right of subrogation, the mortgagor should be discharged. So by the better view, the land is held to be the principal debtor and the mortgagor a surety. *Murray* v. *Marshall*, 94 N. Y. 611; *Bunnell* v. *Carter*, 14 Utah 100. It seems clear, therefore, that inasmuch as the debtor cannot be subrogated against his surety, the principal case is sound.

NEGLIGENCE — DUTY OF CARE — DEGREES OF NEGLIGENCE. — *Held*, that it is error to enter judgment upon a verdict based upon the inconsistent grounds of both gross and ordinary negligence, for "gross negligence" implies wilful misconduct. *Rideout* v. *Winnebago Traction Co.*, 101 N. W. Rep. 672 (Wis.). See NOTES, p. 536.

POWERS — EXECUTION — EFFECT OF APPOINTMENT IN ACCORDANCE WITH BARGAIN. — The donee of a power of jointuring exercised it in fulfilment of a contract whereby he received fifty pounds from his wife. *Held*, that a court of equity will not set aside the appointment. *Saunders* v. *Shafto*, W. N. 203 (Eng., C. A., 1904).

If one who has an exclusive power of appointment to his children appoint to one of them upon a bargain previously made with that child, equity will relieve against the appointment at the suit of the one taking in default thereof. *Daubeny* v. *Cockburn*, 1 Mer. 626. And if the donee of a power of jointuring execute it upon an agreement that he shall have the benefit of part of the jointure, the execution, so far as it is in his favor, will be set aside. *Lane* v. *Page*, Amb. 233. The present case differs from that first cited, since the wife was the only possible appointee, and it is distinguishable from the second in that the power was completely exercised. In taking advantage of these distinctions and in declaring the present appointment good, the case, which expressly overrules an earlier decision, probably settles the law of England on this precise question. *Baldwin* v. *Roche*, 5 Ir. Eq. 110; *Whelan* v. *Palmer*, 39 Ch. D. 648, *contra*, overruled.

PRESUMPTIONS — APPLICATION OF THE PRESUMPTION THAT A WOMAN OF ADVANCED YEARS IS INCAPABLE OF CHILDBEARING TO QUESTIONS OF MARKETABLE TITLE. — Land was devised to the vendor for life, with remainder to her son in fee, subject to a devise over to the children of M., a married woman, in the event of the death without issue of the vendor's son. The son was living and had had issue, and he and the existing children of M. had conveyed their interests to the vendor. M. was now a widow and fifty-four years of age. *Held*, that the court, acting upon the

presumption that there will be no further issue of the body of M., will declare that the vendor can make a good title in fee simple. *In re Tinning and Weber*, 25 Can. L. T. (Occasional Notes) 38 (Ont., Ct. App.).

For the purpose of determining questions of remoteness arising under the rule against perpetuities, men and women are both deemed capable of having issue as long as they live. *Jee* v. *Audley*, 1 Cox, 324. Moreover, the courts will not make use of the presumption that a woman of advanced years is past the age of childbearing if the effect is to deprive a living person of a possible interest. *In re Hocking*, [1898] 2 Ch. D. 567. This presumption has, however, a well-established place in the law, as is shown by several cases in which courts have directed the payment of funds to parties whose claims were dependent upon it. *Leng* v. *Hodges*, Jac. 585. Since, although not of universal application, it is a presumption not unknown to the law, it would seem that it is properly applied to cases involving the question of marketable title, that being a matter upon which mathematical certainty is not required, moral certainty being regarded as sufficient. *Lyddale* v. *Weston*, 2 Atk. 19. The principal case has the support of what authority directly in point has been found. *Browne* v. *Warnock*, L. R. 7 Ir. Ch. D. 3.

PRESUMPTIONS — NATURE AND SCOPE — RELATION OF PRESUMPTIONS TO EVIDENCE. — In an action upon a life insurance policy the jury were instructed that a presumption of law that the declarations of the deceased in his application were true, had probative value, so that if the evidence upon the point was evenly balanced, they should find for the plaintiff, upon whom lay the burden of proof. *Held*, that the instruction is erroneous. *Vincent* v. *Mutual, etc., Life Ass'n*, 58 Atl. Rep. 963 (Conn.).

Connecticut has already held that the presumption of innocence is not evidence in criminal trials, but only imposes the burden of proof beyond a reasonable doubt. *State* v. *Smith*, 65 Conn. 283. And upon the probative value of presumptions in civil cases the present decision, in harmony with this position, expressly overrules an earlier case. *Barber's Appeal*, 63 Conn. 393. In consequence the state is brought into agreement with the best text-writers and authorities. THAYER, PREL. TREAT. EV. 313, 551; 1 GREENLEAF, EV., 16 ed., § 34, n. 1. A presumption is not evidence, but a legal rule or conclusion springing, in many instances, from evidential facts, which throws upon the party against whom it operates the burden of coming forward with evidence sufficient to overcome or destroy it. Once destroyed, it is, as a presumption, incapable of being measured or weighed against actual evidence. The court attributes its change of front to the clear, convincing, and exhaustive contributions of Professor Thayer to the subject of legal presumption, in a note to which he cited and criticised the case now overruled. THAYER, PREL. TREAT. EV. 564.

QUASI-CONTRACTS — RIGHTS ARISING FROM MISTAKE OF FACT — RECOVERY OF OVER-PAYMENT BY TRUSTEE. — A trustee, who was one of the beneficiaries of the trust, through mistake in his accounts paid the other beneficiaries more than their shares of the income, and died. *Held*, that his executor may not recover the overpayments or balance them by retention of future income. *In re Horne*, [1905] 1 Ch. 76.

Generally money paid under mistake of law cannot be recovered. *Bilbie* v. *Lumley*, 2 East 469; *contra*, *Mansfield* v. *Lynch*, 59 Conn. 320. But if a payment is by a trustee it may be recovered, or balanced by retention of future payments, for the benefit of the true beneficiary, since the wrongful holder of trust property should make reparation to the innocent *cestui*. *Dibbs* v. *Goren*, 11 Beav. 483. In the principal case the beneficiary was not allowed to recover, for his dual legal position could not alter the fact that he himself was as much to blame for the incorrect payment as if there had been no trust. This would probably be sound if, as the court seemed to think, it were a mistake of law. But apparently it was not, but simply a mistake as to what the shares were in fact. In such a case even the party in fault may recover. *Appleton Bank* v. *McGiloray*, 4 Gray (Mass.) 518. The court's argument from inconvenience to the defendant seems inapplicable in the absence of evidence that change of his circumstances would make repayment inequitable. The burden to show this was on the defendant. *Walker* v. *Conant*, 65 Mich. 194.

QUIETING TITLE — REMOVAL OF CLOUD — WHAT CONSTITUTES A CLOUD. — A corporation filed a bill to quiet title. It did not appear that the defendant's claim amounted to more than a claim on an oral contract. *Held*, that the plaintiff may obtain a decree. *Morgan & Co.* v. *Palmer*, 79 Pac. Rep. 476 (Wash.). See NOTES, p. 527.

RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — ENFORCEMENT OF RESTRICTIONS: WHO MAY ENFORCE. — *Held*, that owners of subdivisions of a parcel

of land, subject to a restrictive covenant, deriving their respective portions through mesne conveyances without any restrictions, cannot enforce the original agreement against one another. *Lewis* v. *Ely*, 100 N. Y. App. Div. 252. See NOTES, p. 535.

STATUTES — INTERPRETATION — STATUTE PERMITTING ACTION IN FORMA PAUPERIS. — A federal statute provided that a citizen might "commence and prosecute to conclusion any such suit or action" without giving security if he filed an affidavit of his poverty. A verdict being rendered against the plaintiff, she sued out a writ of error from the Circuit Court of Appeals, and, on the clerk's refusing to docket the case until she deposited security for the payment of the costs, she petitioned that she be allowed to prosecute the cause *in forma pauperis*. The case was certified to the Supreme Court for decision. *Held*, that her petition be denied. *Bradford* v. *Southern Ry. Co.*, 195 U. S. 243.

The present decision is the result of a strict construction of the statute; and is the logical outcome of a previous case in which it was decided that this statute does not apply to writs of error from the Supreme Court. *Gallaway* v. *Fort Worth Bank*, 186 U. S. 177. The merits of the decision seem to depend upon the relative desirability of a strict or liberal construction of the statute. The lower federal courts have inclined to apply the Act to writs of error in order to enable the poor to avail themselves of all legal remedies. *Cf. Reed* v. *Pennsylvania Co.*, 111 Fed. Rep. 714; *contra*, *The Presto*, 93 Fed. Rep. 522. And in this position they have the support of several of the state courts. See *Falkenburgh* v. *Jones*, 5 Ind. 296, 299. On the other hand, the dislike of allowing litigation at the expense of others has induced certain courts to take the opposite position. See *Moore* v. *Cooley & Blackman*, 2 Hill (N. Y.) 412. While there is very great weight in this argument, yet it might be maintained that Congress, in aiding the poor to secure their legal rights, intended a complete rather than a partial remedy.

TRIAL — VERDICTS — UNANIMITY OF JURY UPON GROUNDS OF VERDICT. — In an action for injuries resulting from a collision with the defendant's street-car the plaintiff alleged several respects in which the operation of the car had been negligent. Instructions requested by the defendant that nine of the jury, the number necessary for a verdict in Missouri, must agree upon one or more of the specifications of negligence before finding for the plaintiff, were refused. *Held*, that there is no error. *Holden* v. *Missouri Rd. Co.*, 84 S. W. Rep. 133 (Mo., St. Louis Ct. App.); *Wacker* v. *St. Louis Transit Co.*, 84 S. W. Rep. 138 (Mo., St. Louis Ct. App.).

By a Missouri statute the jury are required in certain classes of suits, including the cases under consideration, to render a general verdict. Mo. Rev. St. c. 8, § 721. As they cannot be expected to agree upon all the varied issues of fact involved, how far unanimity shall be required upon the grounds of this verdict, if at all, would seem a question of degree. It may be objected that unless there is agreement upon such fundamental allegations as those in the principal cases, there is no real unanimity and no common basis for a verdict. *Cf. Parrott* v. *Thacher*, 9 Pick. (Mass.) 426; *Biggs* v. *Barry*, 2 Curt. (U. S.) 259. There is here, however, but one cause of action and one main issue, the negligence of the defendant. *Brownell* v. *Pacific Rd. Co.*, 47 Mo. 239. Therefore the court reasons with fairness that to give the requested instruction would be to require indirectly a special verdict, and that the mental operations by which the general verdict is reached are not for the court to control. See *Murray* v. *New York, etc., Co.*, 96 N. Y. 614.

TRUSTS — RESULTING TRUSTS — EFFECT OF GRANT FOR ILLEGAL PURPOSE. — The plaintiff, in order to escape taxation, fraudulently took certain securities for loans in his son's name. The son subsequently discovered the fact and took possession of the securities. The plaintiff brought a bill in equity praying that the securities be impressed with a trust for him. *Held*, that a resulting trust arises in favor of the plaintiff. *Monahan* v. *Monahan*, 59 Atl. Rep. 169 (Vt.).

As a general rule, where parties are *in pari delicto* neither can recover against the other. *Taylor* v. *Chester*, 4 Q. B. 309. At law, however, the plaintiff is not barred if he does not have to disclose his own wrong in the pleadings. See *Swan* v. *Scott*, 11 S. & R. (Pa.) 155. In equity it is doubtful if this limitation would apply, if the plaintiff's wrong appeared in the presentation of the case, because equity will not aid one who does not come with clean hands, where his wrong was part of the same transaction. *Cadman* v. *Horner*, 18 Ves. Jun. 10. On this ground the principal case seems wrong. A stronger objection may be urged. Where a parent pays the purchase money, but takes title in the child's name, a presumption arises that the transaction was intended as an advancement to the child. *Respass* v. *Jones*, 102 N. C. 5. Here the plaintiff could rebut the presumption only by evidence that he intended the transaction as a

device to evade taxation. Where proof of his illegal purpose is essential to the establishment of his case it seems clear that equity should not aid him. *Cf. Roberts* v. *Lund*, 45 Vt. 82.

TRUSTS — VALIDITY — CESTUI TO BE DETERMINED BY TRUSTEE. — A fund was bequeathed to the Bishop of Utah on trust to erect therewith a church and rectory at such place as the bishop should select. *Held*, that the trust is invalid for indefiniteness. *Mount* v. *Tuttle*, 99 N. Y. App. Div. 433. See NOTES, p. 529.

WILLS — CONSTRUCTION — IMPLIED DEVISE. — A testator willed that after the death of his wife his land should go to two of his four co-heiresses. *Held*, that during the life of his widow the land descends as intestate property. *In re Willatts*, 21 T. L. R. 194 (Eng., Ch. D.).

A devise or bequest to the testator's heir, or next of kin after the death of A, gives A a life estate by implication. Y. B. 13 Hen. VII. 17, pl. 22; see *Macy* v. *Sawyer*, 66 How. Pr. (N. Y.) 381. But where the gift is to one other than the testator's heir or next of kin after the death of A, the estate during A's life goes to the testator's heir or legal representatives. *Stevens* v. *Hale*, 2 Drew. & Sm. 22. The decision in the latter case is a result of the ordinary principle that property undisposed of by will passes as intestate property. Since, however, a strict application of this principle to the former case would make the testator practically intestate as to this property, the courts construe the will as giving a life estate to A by implication; for otherwise the clause would be a nullity. *Cf.* BACON, USES, ROWE'S ED., 223 n. But in the principal case there is no need for such a construction, as the ordinary one would not result in intestacy. The decision, then, appears correct, and avoids any unfortunate litigation over what the testator might have meant but did not say.

WILLS — NUNCUPATIVE WILLS — MEANING OF PHRASE "LAST SICKNESS." — A statute gave validity to a "verbal will made in the last sickness" of the testator. The deceased, during an illness which he expected would prove fatal, gave verbal directions for the disposition of his property. At that time he had the opportunity to make a written will; and his death, though from the same illness, did not occur until sixteen days later. *Held*, that the directions constitute a valid verbal will. *Baird* v. *Baird*, 79 Pac. Rep. 163 (Kan.).

The Statute of Frauds declared nuncupative wills invalid unless "made in the last sickness of the deceased." In most jurisdictions identical statutory phrases have been construed as meaning *in extremis*. *Prince* v. *Hazleton*, 20 Johns. (N. Y.) 502; *Carroll* v. *Bonham*, 42 N. J. Eq. 625. That the testator at or after the time of speaking the testamentary words had a reasonable opportunity to execute a written will, is held fatal to the validity of the verbal one. *Scarfe* v. *Emmons*, 84 Ga. 619. Another interpretation considers the requirement satisfied if the deceased spoke the words at any time during the particular illness which resulted fatally and when impressed with the probability of death. *Harrington* v. *Stees*, 82 Ill. 50; *Nolan* v. *Gardner*, 7 Heisk. (Tenn.) 215. The former position seems preferable. In order that the safeguards of a written will may not be too easily avoided, it would seem that nuncupative wills should take effect only if made *in extremis*; and whether or not one was so made should depend on the extent of the opportunity to make a written will rather than on the precise length of the interval before death. The testator's anticipation of death should be material only as evidence of the testamentary intention.

WITNESSES — COMPETENCY — CONTRACT WITH DECEASED. — The New York Code provided that a person interested in the event of the suit or a person from, through, or under whom such interested person derived his interest should not testify against the executor, as to any personal transaction with the deceased. Notwithstanding this provision the mother of an illegitimate son was allowed to testify, in an action by the child, to a promise, made to her, by the deceased father, to leave one hundred thousand dollars to her son. *Held*, that this is error. *Rousseau* v. *Rouss*, 180 N. Y. 116.

It is a doctrine of long standing in New York that the beneficiary, under a contract between third parties, cannot sue unless the promisee is interested in his recovery. *Vrooman* v. *Turner*, 69 N. Y. 280. Such a suit is allowed, however, where the promisee's interest is no greater than that of the mother in the principal case. *Cf. Todd* v. *Weber*, 95 N. Y. 181. But such an interest is not enough to debar one from testifying as a "person interested" under the Code. *Cf. Connelly* v. *O'Conner*, 117 N. Y. 91. This is a peculiar and somewhat confusing gradation of interest. The ground now taken by the court is that the child's interest was derived through the mother, as she furnished the consideration which made the promise binding. This denies the simple view that an interest cannot be derived from one by whom it was never held; and re-

verses two prior decisions on the same point. *Bouton* v. *Welch*, 170 N. Y. 554; *Soduil* v. *Kidd*, 64 Hun (N. Y.) 585. It would seem unfortunate that these latter holdings have been disturbed, for, even if the question were *res integra*, they would appear to furnish the more reasonable construction of the Code.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

RESERVED POWER OF STATE TO CONTROL CORPORATION. — The theoretical basis of the state's power to alter or modify corporate charters, the express reservation of which has been common since the decision of the Dartmouth College case, is analyzed in a series of three articles in the American Law Register. *The Limitations of the Power of a State under a Reserved Right to Amend or Repeal Charters of Incorporation*, by Horace Stern, 53 Am. L. Reg. 1, 73, 145 (Jan.–Mar. 1905). The author asserts that if his contentions be correct, "almost the entire law on the subject of the control of the state over corporations must be rewritten." He attacks the decision in the Dartmouth College case, and would prefer to rest it upon a ground different from that which the court assigned as the basis for its conclusion. The line of argument pursued may be briefly summarized as follows: The incorporators to whom a charter is issued have previously formed among themselves a contract analogous to that of a partnership. The terms of this agreement prescribe the scheme of organization and membership. Its validity is independent of the legislative act of incorporation. Whether or not the charter which confers the franchise of incorporation is a contract between the state and the incorporators, any statute which impairs the obligation of this contract previously made between the incorporators is unconstitutional. The act of the legislature of New Hampshire in amending the charter of Dartmouth College, so as to increase the number of trustees, violated the preliminary contract by which the original incorporators agreed among themselves that the number of trustees should be twelve and no more.

The writer proceeds to point out that under the view generally accepted since Marshall's famous opinion, the state, as a contracting party to the charter, ought to be regarded as acting in a private, not a sovereign, capacity. Likewise the power reserved by statute to amend or repeal a charter is to be considered "a power reserved by the state as a private party to a contract, and not as a sovereign agency of government." The legal position of the state with reference to the charter therefore becomes identical with that of a private individual who in his contract has reserved the right to rescind at his pleasure.

The distinction between these two contracts — one between the state and the incorporators, the other between the incorporators themselves — should, in the author's opinion, determine the limits of the revoking power of the state. On the one hand, the state should be able to alter or revoke all rights conferred in the charter, including the franchise to exist as a corporation. It should have the right to impose any condition it chose upon the corporation, and to provide that compliance therewith should be the price of the continued enjoyment of the franchise. Thus the state should have power to recall the right to regulate its rates conferred by charter upon a public service corporation, and to refuse to allow it to exact reasonable charges or any charges at all for its services. But on the other hand, the state should not be able to deprive the corporation of its property or rights which are not conferred by the charter. The state, not being party to the contract of the incorporators *inter se*, should be unable to reserve or exercise a power to alter such contract; hence the internal management of the corporation and the rights of its members, as determined by the contract made prior to the act of incorporation, it should not be within the power of the state to modify.